IN THE SUPREME COURT OF IOWA

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SUPREME COURT NO. 16-0435

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CITY OF CEDAR RAPIDS,

Plaintiff-Appellee,

v.

MARLA MARIE LEAF,

Defendant-Appellant.

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APPEAL FROM THE DISTRICT COURT FOR LINN COUNTY
HONORABLE JUDGE PATRICK R. GRADY

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# PLAINTIFF-APPELLEE'S RESISTANCE TO DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER REVIEW FROM COURT OF APPEALS DECISION FILED FEBRUARY 22, 2017

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## Questions Presented for Review

1. Whether the Court of Appeals erred in rejecting the claim of Defendant-Appellant Marla Leaf ("Ms. Leaf") that her procedural due process rights were violated?
2. Whether the Court of Appeals erred in rejecting Ms. Leaf's claim that her equal protection rights were violated?
3. Whether the Court of Appeals erred in determining Cedar Rapids Municipal Code Section 61.138's administrative hearing procedure is not preempted by Iowa Code Sections 364.22(4), (6), or 602.6101?
4. Whether the Court of Appeals erred in determining that Cedar Rapids Municipal Code Section 61.138 does not unconstitutionally delegate municipal police power to a private company?

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## Statement Resisting Further Review

Ms. Leaf's Application for Further Review (the "Application") does not meet the criteria for further review. An application for further review is not a matter of right but is discretionary. Iowa R. App. P. 6.1103(1)(b). Applications for further review "are not granted in normal circumstances." *Id.* Iowa Rule of Appellate Procedure Rule 6.1103(1)(b)(1)–(4) sets forth criteria which the Court considers in deciding whether to grant an application for further review. Ms. Leaf has asserted that three of those four criteria are present in this case, namely that:

> (1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter;
>
> (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court;
>
> ...[and]
>
> (4) The case presents an issue of broad public importance that the supreme court should ultimately determine.

Iowa R. App. P. 6.1103(1)(b)(1), (2) & (4).

As to the first factor, contrary to Ms. Leaf's assertion, the Court of Appeals did not enter a decision in conflict with the Iowa Supreme Court's decision in *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008).

(Application, p. 5). As detailed further in Section IV, below, the Court of Appeals opinion in this matter is consistent with *Seymour*.

As to the second factor, while Ms. Leaf has raised, and the courts have determined, constitutional questions in this case, *substantial* questions of constitutional law have not been raised or decided in this case.[1] Iowa R. App. P. 6.1103(1)(b)(2). The Court of Appeals did not overturn precedent or venture into previously untouched areas of the law in rejecting Ms. Leaf's constitutional claims. The Court of Appeals' decision is consistent with all other Iowa case law on this matter, as well as relevant federal case law from the Northern and Southern Districts of Iowa and the Eighth Circuit.

Finally, as to the fourth factor, Ms. Leaf's claims are not issues of broad public importance which require the Supreme Court's input. Iowa R. App. P. 6.1103(1)(b)(4). At its core, this is a small claims case about a $75 speeding ticket received by one individual and the resolution of that ticket. Prior to reaching this Court by way of an Application for Discretionary Review, Ms. Leaf's claims were considered by a magistrate and then a district court judge on appeal. This Court then granted discretionary review but, after briefing by the parties, made the decision to transfer the case back down to the Court of

[1] Ms. Leaf has not argued that the third factor listed in Iowa Rule of Appellate Procedure 6.1103(1)(b) is present in this matter, nor could she credibly do so. The Court of Appeals did not opine on any important questions of changing legal principles in this matter. Iowa R. App. P. 6.1103(1)(b)(3).

Appeals. Implicit in this transfer is a decision by this Court that there are no issues of broad public importance or substantial constitutional questions in this matter. *See* Iowa R. App. P. 6.1101(2)(a) & (d) (2017)(providing that the Supreme Court will ordinarily retain cases presenting substantial constitutional questions and cases presenting fundamental and urgent issues of broad public importance). There are no remaining claims in this matter that warrant additional discretionary review and more of this Court's time.

The same arguments advanced by Ms. Leaf in this case have been consistently resolved by the Sixth Judicial District, Iowa Court of Appeals, Northern District of Iowa, Southern District of Iowa, and Eighth Circuit Court of Appeals. In addition, this Court has already considered and rejected challenges to Automated Traffic Enforcement systems which are in all material respects similar to Ms. Leaf's claims.[2] Given that there are no grounds which warrant further review of the Court of Appeals' decision in this matter, the Court should deny Ms. Leaf's Application for Further Review of that decision.

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[2] *City of Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015) (rejecting constitutional challenge to Sioux City's ATE ordinance); *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008) (Davenport's ATE ordinance not preempted by Iowa Code chapter 321).

## Brief in Resistance to Ms. Leaf's Application for Further Review

### I. The Court of Appeals Correctly Determined that Ms. Leaf's Procedural Due Process Rights Were Not Violated

The Court of Appeals correctly found that the administrative hearing process is optional, not required, and Ms. Leaf was provided due process in this matter. *City of Cedar Rapids v. Leaf*, 16-0435, 2017 Iowa App. LEXIS 206, at *12-13 (Iowa Ct. App. Feb. 22, 2017). The record does not support Ms. Leaf's contention that she was forced to go through the administrative hearing.[3] (App. pp. 00065-00066). Even if Ms. Leaf were required to participate in the administrative hearing process before proceeding to court, which Plaintiff-Appellee City of Cedar Rapids (the "City") does not concede, it does not follow that such a requirement would give rise to a due process violation. There are many circumstances in which parties are required to exhaust administrative remedies before going to court and Ms. Leaf cannot seriously argue that all of those circumstances violate due process as well.

Moreover, the fact that the Notice of Violation received by Ms. Leaf did not lay out her right to go directly to court to contest that notice, by

[3] In support of this argument, Ms. Leaf, in footnote 1 of the Application, makes reference to what appears to be a local newspaper article, which is not in the record and the accuracy of which is unknown. This is not appropriate and should be stricken from consideration by the Court.

requesting that the City file a municipal infraction against her, does not give rise to a due process violation. *See City of W. Covina v. Perkins*, 525 U.S. 234, 241 (U.S. 1999)(finding that notice provided by City did not need to include notice of remedies available to seized property owner where he could turn to public sources to obtain this information). This is particularly true where, as here, the Notice of Violation contained a reference to the municipal code section at issue, Cedar Rapids Municipal Code Section 61.138 ("Section 61.138"), and an internet address where Ms. Leaf could obtain and review a complete copy of that section, including subsection (e) relating to her right to contest the violation by municipal infraction if she wished to do so. (App. p. 00121). The notice that is required for due process is not "notice of [Ms. Leaf's] rights to contest a Notice of Violation directly to the district court[,]" as argued by Ms. Leaf (Application, p. 7) but, rather, it is notice that a matter affecting her property rights is pending. *See City of W. Covina*, 525 U.S. at 240-41. This is exactly what the Notice of Violation did in this matter. (App. pp. 00120-00121).

"The requirements of procedural due process are simple and well established: (1) notice; and (2) a meaningful opportunity to be heard." *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 264 (Iowa 2001). In determining the process due, the Court balances the (1) private

interest at stake, (2) risk of erroneous deprivation, and (3) government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Ms. Leaf has been given more than adequate procedural due process in this matter, particularly considering the relatively minor property interest at stake.

A. The Private Interest at Stake

There is no dispute that Ms. Leaf has a property interest in the $75.00 fine at issue in this matter. However, this is the only interest at stake. Ms. Leaf argues that there is also an interest in the form of time, which is lost by the administrative hearing. Even assuming such an interest is a protected property interest for due process purposes, which the City does not concede, that interest is not at stake here in light of the fact the administrative hearing is voluntary and can be bypassed upon request. (App. pp. 00065-00066). *See also* Section 61.138(e). Ms. Leaf also asserts, at least as best as the City can tell, that there is some sort of protected interest in not being subjected to "formal collection procedures" or "being reported to a credit agency." Again, even assuming such an interest is a protected property interest for due process purposes, which the City does not concede, that interest is not at stake here because Ms. Leaf timely contested liability for the violation. The Notice of Violation in this matter makes clear that the vehicle owner may be subject to such action only after they fail to pay the civil fine or contest liability within

30 calendar days. (App. p. 00120). Therefore, the $75.00 property interest is the only interest at stake in this matter. Weighing the $75.00 property interest, the reviewing court then determines what amount of process is due to Ms. Leaf and whether she has been afforded that due process.

It is undisputed that Ms. Leaf received the Notice of Violation. (App. p. 00018). That Notice clearly provided Ms. Leaf not only with notice of the violation at issue, but also with notice of her right to contest the violation and the information she needed in order to obtain further detail regarding her contest rights. (App. pp. 00120-00121). It is also undisputed that Ms. Leaf requested and received an administrative hearing and also requested, and has now received, a trial in the small claims division of the Iowa District Court for Linn County.[4] (App. pp. 00019-00022 & 00126). Ms. Leaf has never claimed, nor could she, that the process that commenced once the City filed the municipal infraction in the small claims division of the Iowa District Court did not comply with Iowa Code Section 364.22. She claims she was entitled to that process (Application, p. 12) and that is what she was given. After her small claims trial, Ms. Leaf was allowed further opportunity to be heard by on

[4] It is worth noting that, even if Ms. Leaf had not exercised her right to contest the violation within the required time period, and the fine were imposed, she would be given notice and opportunity to be heard prior to the fine actually being involuntarily collected from her because the fine could not be collected against her wishes without first being reduced to a court judgment.

appeal by a district court judge and, now, the Iowa Court of Appeals. Therefore, Ms. Leaf has been afforded procedural due process in multiple respects, not the least of which is the judicial review afforded by the municipal infraction proceeding and the appeals that have followed. *Lujan, et al. v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001) (holding that, where ordinary judicial process is available, "that process is due process.")

B. Risk of Erroneous Deprivation

Ms. Leaf appears to argue that the process used by the City somehow "dissuaded" her from exercising her rights, again citing the portion of the Notice of Violation that notifies the registered owner that *if* they don't pay the fine or contest liability within 30 days *then* collection procedures could commence. (App. p. 00120). Given that the Notice of Violation makes clear that collection procedures will only commence if Ms. Leaf does not timely contest liability, this provision should not have significantly dissuaded her from contesting liability and, as is clear from the record, it did not. Moreover, regardless of anything an employee of Gatso, the City's Automated Traffic Enforcement contractor, may or may not have said to Ms. Leaf, the documents provided to Ms. Leaf by the City made clear that she had the right to contest the violation. (App. pp. 00120-00121, 00124-00125 & 00138-00139). Furthermore, again, it is clear from the record in this matter that Ms. Leaf was

not significantly dissuaded from exercising her right to contest the violation by anything that may or may not have been said by a Gatso employee.

C. Government's Interest

The City has an interest in protecting the public and the City's police officers from speeding vehicles and enforcing laws within its corporate limits in a cost-effective manner. Contrary to Ms. Leaf's assertions, it is the Court, not the Iowa Department of Transportation ("DOT"), that decides whether these are a legitimate government interests for purposes of due process and other constitutional analysis (including equal protection analysis, addressed later herein). Ms. Leaf appears to argue that direct access to the court is the substitute procedure that is necessary in order to make Section 61.138 constitutional on due process grounds. At the outset, the problem with this argument is that Section 61.138 *does* allow for direct access to the court. If a vehicle owner wishes to go directly to court by way of a municipal infraction, they can do so. *See* Cedar Rapids Municipal Code Section 61.138(e). (App. pp. 00065-00066).

To the extent Ms. Leaf is suggesting that the City should be required to file a municipal infraction against every vehicle owner whose vehicle is captured by the ATE equipment violating Section 61.138, which the City believes she may be, such a requirement is wholly unreasonable and

impracticable. First, it would impose a huge financial burden on the City, as well as placing a substantial burden on the already stretched resources of the Court. Such a requirement would also impose an undue burden on those vehicle owners who do not wish to contest the violation but, rather, just want to pay it, because they would then get stuck paying the court costs involved in the municipal infraction as well as the civil fine if they were found liable. Even if it were reasonable to impose such a financial burden on the City, it is not reasonable to impose such burdens on the Court or the vehicle owners who do not wish to contest liability, just so that vehicle owners like Ms. Leaf do not have to go to the trouble of submitting a request that the City file a municipal infraction, as was ultimately done by Ms. Leaf. (App. p. 00126).

It is also possible that Ms. Leaf is arguing that the administrative hearing process should be eliminated and anyone who wishes to contest their violation, rather than just pay it, should go through the municipal infraction process. This substitute procedure would also impose a financial burden on the City and a substantial burden on the Court system. It may also have an adverse impact on vehicle owners, as some who wish to contest their violation may be deterred from doing so by the court costs that can be assessed in addition to the civil fine if they lose in the municipal infraction proceedings.

The free administrative hearing that is currently offered by the City alleviates this issue and helps free up the Court for other matters.

To the extent Ms. Leaf argues that the optional administrative hearing process is biased and, therefore, unfair and violates of due process, she is wrong for several reasons. First, and perhaps foremost, it is not biased. The hearing officers who render the decisions are volunteers, not employees of the City. (App. p. 00065). Ms. Leaf's allegation that police officers for the City are "the ones making final decisions at the administrative hearings" (Application, p. 10, n. 5) and "are making adjudicative determinations involving the assessment of penalties[,]" (Application , p. 11) is a mischaracterization and exaggeration of one isolated incident in the record.[5] Even if there were bias, which the City does not concede, that bias was rectified when the magistrate at the small claims trial of the municipal

[5] Officer Mark Asplund testified that there was one instance he could remember where an administrative hearing officer was asked by a police officer to change their decision and that was only after Officer Asplund learned mitigating facts subsequent to the administrative hearing that were not presented to the hearing officer. After learning those mitigating facts, Officer Asplund went back to the hearing officer and "basically asked" the hearing officer to find the vehicle owner "not liable." (App. p. 00074). Officer Asplund further testified that the hearing officer agreed this reversal was appropriate. It is a far stretch to argue, as Ms. Leaf does, that it is the police who "are making adjudicative determinations involving the assessment of penalties[,]" particularly considering the fact that Officer Asplund also testified that he was aware of no circumstance where a hearing officer's finding was changed from "not liable" to "liable." (App. pp. 00076-00077).

infraction heard the matter anew, with no deference given to the findings from the administrative hearing.[6] (App. p. 00147).

## II. The Court of Appeals Correctly Determined that Ms. Leaf's Equal Protection Rights Were Not Violated

The Court of Appeals cited to the Eighth Circuit's opinion in *Hughes v. City of Cedar Rapids*, 840 F.3d 987 (8th Cir. 2016), at pages 996-97, in support of its determination that Ms. Leaf's equal protection claim failed. *Leaf*, 2017 Iowa App. LEXIS 206, at *15. Ms. Leaf appears to argue that this was in error because the *Hughes* Plaintiffs' claims under the Iowa Constitution were dismissed without prejudice as not ripe and, therefore, according to Ms. Leaf, *Hughes* does not support the Court of Appeals rejection of the equal protection claim in this matter. (Application, pp. 12-13). However, the Court of Appeals' citation to *Hughes* begins on page 996 of that decision, where the Eighth Circuit rejects the Plaintiffs' claims under the *federal* constitution. *Hughes*, 840 F.3d at 996–97. It is not until after this section in the *Hughes* decision that the Eighth Circuit determines the Plaintiffs' claims under the Iowa Constitution are not ripe. *Id.* at 997. The

[6] Ms. Leaf cites *Ward v. Monroeville*, 409 U.S. 57, 61 (1972), for the proposition that "having access to a proper tribunal at a later date does not rectify the defective due process of the original administrative hearing." *Ward* involved defects in a criminal trial on the merits. Therefore, it is clearly distinguishable from the present case, where there is an alleged defect in the administrative hearing relating to a civil matter that was followed later by a trial on the merits.

Court of Appeals' citation to *Hughes* in rejecting Ms. Leaf's equal protection claim merely reflects that the Court of Appeals found the Eighth Circuit's federal constitutional analysis to be persuasive authority for purposes of its own evaluation and rejection of Ms. Leaf's equal protection claim under state law.

Turning to the heart of the issue, there is no fundamental right involved in this matter, given that Section 61.138 in no way imfringes on Ms. Leaf's right to travel, and no suspect class is singled out by Section 61.138. Therefore, Section 61.138 need only have a rational basis to survive a challenge under the Iowa Equal Protection Clause. *See Perkins v. Bd. of Supervisors,* 636 N.W.2d 58, 73 (Iowa 2001); *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 842-845 (N.D. Iowa 2015). Under rational basis review, "the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F. Supp. 2d 822, 859 (N.D. Iowa 2006) (quoting *City of Cleburne*, 473 U.S. at 440). "A statutory classification that neither proceeds along suspect lines nor infringes fundamental rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that

could provide a rational basis for the classification." *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

As the basis for her equal protection claim, Ms. Leaf alleges that the City and Gatso, in implementing Section 61.138, "eliminate from consideration tens of thousands of vehicles" and Gatso "excludes from prosecution virtually all semi-truck owners pulling trailers whose *rear* license plates are not included in the City's chosen database; in addition, it excludes more than 3000 government vehicles whose license plates are not in the database." (Application, p. 14). It does not matter for purposes of equal protection that the ATE system is not designed to capture every violation of traffic laws. Incremental problem solving or under inclusiveness does not make an ordinance unconstitutional. "Under the rational basis test, we do not require the ordinance to be narrowly tailored." *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007). An ordinance is not unconstitutional "simply because it benefits certain individuals or classes more than others." *Perkins,* 636 N.W.2d at 73 (citing *Train Unlimited Corp. v. Iowa Ry. Fin. Auth.,* 362 N.W.2d 489, 495 (Iowa 1985)).

The City's decision to implement an ATE system that captures only rear license plate images satisfies the rational basis test. *See Hughes*, 112 F. Supp. 3d at 842 ("For example, the City could rationally conclude that a system that

only photographs rear license plates is less expensive and that it is more cost-effective to capture fewer people who violate the Ordinance with a less expensive system.") Implementing a system that takes pictures of both front and rear license plates would be more invasive of privacy (passengers in a vehicle may be identifiable), more costly, technically more difficult, largely redundant, and burdensome. *Hughes*, 112 F. Supp. 3d at 842 ("It is irrelevant that other ATE systems exist that allow for photographs of both front and rear license plates."). "The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Hawkeye Commodity Promotions, Inc*, 432 F. Supp. 2d at 859 (quoting *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538 (1949)). Additionally, use of the database used by the City, Nlets, is rational. *Hughes*, 112 F. Supp. 3d at 842 ("Defendants could rationally conclude that purchasing the license plate databases it does is the most cost-effective way to enforce the Ordinance.") It is a reasonable, cost-effective source of information.

Because Ms. Leaf cannot show that the ATE system is constitutionally irrational, the Court of Appeals was correct in its determination that her equal protection claim fails.

## III. The Court of Appeals Correctly Determined that Section 61.138 is Not Preempted by Iowa Code Sections 364.22(4) & (6) and 602.6101

As a starting point, it is important to note that the Court of Appeals elected to hear this issue, despite the fact it was not properly preserved by Ms. Leaf. *Leaf*, 2017 Iowa App. LEXIS 206, at *16. The Court of Appeals' election to hear an issue it was not required to hear should not form a basis for a reversal of its decision or further review by this Court.

Moreover, the Court of Appeals relying on the principles of preemption articulated in *Seymour, Hughes* and *Brooks v. City of Des Moines,* 844 F.3d 978 (8th Cir. 2016), properly determined Section 61.138 is not preempted. *Leaf*, 2017 Iowa App. LEXIS 206, at *16-17. "A local ordinance is *not* inconsistent with a state law unless it is *irreconcilable* with the state law." *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 859 (Iowa Ct. App. 2002) (emphasis in original). Section 61.138's provision for an optional administrative hearing is *in addition to* direct access to the Iowa courts; it does not prohibit anything that state law allows or allow anything which state law prohibits. *Seymour*, 755 N.W.2d at 542. Stated otherwise, Section 61.138 does not prohibit an individual from going directly to court and there is nothing in state law, or any other legal authority for that matter,

that prohibits additional, optional administrative processes such as the one in Section 61.138.

Ms. Leaf's argument that the Court of Appeals' decision is in conflict with *Seymour* is incorrect. *Seymour* determined the ordinance at issue was not preempted by Iowa Code 364.22(5)(b) because that ordinance did not alter the burden of proof applicable to a municipal infraction. *Seymour*, 755 N.W.2d at 542. Under preemption analysis, the proper comparison is the language of Section 61.138 with the Code. *See id* ("preemption only applies where a local ordinance prohibits what a state statute allows or allows what a state statute prohibits"). Section 61.138 does not establish any burden of proof, much less one that is at odds with the Iowa Code. *See* Cedar Rapids Municipal Code § 61.138(e). Therefore, no preemption exists. The Court of Appeals' decision is both correct and wholly consistent with *Seymour*.

Ms. Leaf also argues Section 61.138 is preempted by Iowa Code Section 364.22 because of the manner in which the Notice of Violation was provided to her. In doing so, she asserts that the Court of Appeals made a factual error and determined that the Notice of Violation was sent by certified mail. (Application, pp. 19-20). Although a lengthy quotation from the District Court containing this detail is contained in the Court of Appeals' opinion, nowhere in the Court of Appeals' opinion does the Court make that

factual finding or state that its decision is based on such a fact being true. *See Leaf*, 2017 Iowa App. LEXIS 206, at *7. Moreover, even if it had made that factual finding, it would not cause Section 61.138 to be in conflict with Iowa Code Section 364.22. Again, the proper comparison for preemption analysis is Section 61.138 with the Code. *Seymour*, 755 N.W.2d at 542. Section 61.138 does not specify what form of mail is to be used for sending the Notice of Violation and, therefore, it can be reconciled with Iowa Code Section 364.22.

Moreover, Ms. Leaf lacks standing to bring a claim based upon how the Notice of Violation was provided to her. It is undisputed that Ms. Leaf received the Notice of Violation.[7] (App. p. 00018). Therefore, Ms. Leaf can show no injury in fact and lacks standing on this claim. *Godfrey v. State*, 752 N.W.2d 413, 420-23 (Iowa 2008)(describing injury in fact requirement for standing).

Finally, Ms. Leaf argues that Section 61.138 is preempted by Iowa Code Section 364.22 because she believes Gatso, and not an officer for the City, issues the Notice of Violation. Ms. Leaf is mistaken in this belief. Ms. Leaf's

[7] At no time has Ms. Leaf complained that the municipal infraction was not properly served on her once it was filed with the small claims court, nor could she. It is clear from the Affidavit of Service in the small claims court file in this matter that Ms. Leaf was personally served with the municipal infraction on April 7, 2015.

argument fails to recognize that there is a difference between who "issues" the violation, in this case the police officer, and who physically places the issued violation in the mail, in this case Gatso. The record is clear that police officers for the City, and only police officers for the City, issue Notices of Violation to vehicle owners. (App. pp. 00048-00049 & 00058). Therefore, Section 61.138 is not in any way inconsistent with Iowa Code Section 364.22 on this point either.

## IV. The Court of Appeals Correctly Determined that Section 61.138 Does Not Unconstitutionally Delegate Municipal Police Power to a Private Company

Ms. Leaf is critical of the Court of Appeals for a quotation to the *Hughes* case in a footnote and a quotation to the district court in the body of its opinion. (Application, pp. 20-21). There is nothing wrong with the Court of Appeals making note of what other courts have said on the topic of unlawful delegation, nor does the fact it did so mean it did not conduct a *de novo* review or that it deferred to any implicit decision of this Court. It is clear from the Court of Appeals opinion that it found, based on the fact the City's police officers are the ones who determine who is in violation of Section 61.138, not Gatso, that no unconstitutional delegation of power has occurred. This is the correct holding.

"As a general rule, a municipal corporation 'cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender' unless authorized by statute." *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910, 913-14 (Iowa 2002)(quoting 2A Eugene McQuillin, *Municipal Corporations* § 10.38, at 425 (3d ed. rev. 1996)). "It can, however, delegate its right to perform certain acts and duties necessary to transact and carry out its powers. These delegable acts typically involve functions that require little judgment or discretion." *Warren Cnty*, 654 N.W.2d at 914 (internal citations omitted).

Both Officer Caldwell and Officer Asplund testified at trial that the City's police officers are the *only* parties who approve issuance of Notices of Violation to vehicle owners pursuant to Section 61.138. (App. pp. 00048-00049 & 00058). Moreover, Section 61.138(a) explicitly provides that "[t]he police department will determine which vehicle owners are in violation of the city's traffic control ordinances and are to receive a notice of violation for the offense." Gatso does not decide whether to issue a Notice of Violation to the vehicle owner, nor does it have authority to do so under Section 61.138. (App. p. 00058). Gatso's duties are administrative and require little judgment or discretion. (App. pp. 00058 & 00127-00131). Therefore, there is no unlawful delegation of police power by the City to Gatso. *See City of Sioux*

*City v. Jacobsma*, 862 N.W.2d 335, 337 (Iowa 2015)(upholding Sioux City's ATE ordinance, which uses a similar system to the City's, and stating "[w]hile the ATE ordinance provides that the automated system shall be operated by a private contractor, the police department receives the digital images and determines which 'vehicle owners are in violation of the city's speed enforcement ordinance and are to receive a notice of violation for the offense.'").

**Conclusion**

For all of the foregoing reasons, Ms. Leaf's Application for Further Review should be denied in its entirety.

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This resistance complies with the typeface requirements and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

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Patricia G. Kropf

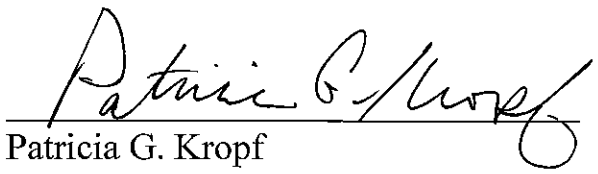
Patricia G. Kropf

3/24/2017

Date

**Proof of Service / Certificate of Filing**

I certify that on March 24, 2017, I served and filed the foregoing Plaintiff-Appellee's Resistance To Defendant-Appellant's Application for Further Review by electronically filing the foregoing document with EDMS, which will notify all parties of the electronic filing.



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